

Adopting a No-fault Compensation Scheme for Motor Vehicle

Accidents in Malaysia: A Myth or Reality?

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Abstract

The present tort compensation scheme which has been widely adopted in common law jurisdictions to address the financial needs of injured victims has been found to be riddled with deficiencies. In focusing on negligence and causation as the foundation of liability, the adversarial system of the law has been strongly criticized as, failing to provide fitting and timely compensation, requiring injured claimants to go through difficult, stressful and long, drawn out litigation procedures coupled with significant legal fees and administrative costs. Concern over tort's effectiveness as an appropriate personal injury compensation mechanism for victims of motor vehicle accidents and the realization that the traditional tort system developed in the days of the horse and carriage was never contemplated to address contemporary issues facing accident victims, a number of common law jurisdictions have initiated significant departures from the system and have moved in the direction of adopting an alternative no-fault compensatory model where all persons injured in road accidents obtain compensation regardless of establishing fault thus shifting the focus on the needs of the injured victim rather than on one's culpability. These modern compensation schemes are premised on the philosophy of community responsibility, social justice and public benefit. This paper surveys the failings of current system of civil liability in the tort of negligence for motor vehicle accidents and undertakes a comparative analysis to evaluate the arguments in support of the introduction of such a scheme in Malaysia, its viability and challenges.

Keywords: No-fault compensation, Motor accident, Negligence

1. Introduction

The introduction of no-fault liability compensation schemes to cover industrial accidents in the nineteenth century has set the impetus for other aspects of the civil justice system to conduct studies on the viability of alternative compensation models for their respective scope of activity. The use of motor vehicles as an indispensable mode of modern day conveyance has had its impact on a corresponding surge in the number of road accidents. The common law tort mechanism was adopted in most common law jurisdiction to determine liability and assess damages to be awarded to the victims of such accidents. However, the practical experiences learnt from its operation over the years have seen the system being fraught with weaknesses producing financial hardships, emotional stress and grave injustices to the injured victims. Recognising its inappropriateness as a compensatory model for victims of motor vehicle accidents, mature common law jurisdictions like New Zealand, Australia and Canada have been prompted to initiate moves to abandon the traditional tort mechanism and in its place, design and implement an alternative remedial compensatory model. The outcome has resulted in a shift of resources away from a system founded on the notion of fault in the direction of introducing an alternative statutory based no-fault system which was viewed as a fairer compensation regime that will provide comprehensive level of benefits expeditiously and at reasonable costs to all injured victims regardless of fault.

These modern compensation schemes have been premised on the philosophy of community responsibility, social justice and public benefit. This paper surveys the failings of current system of civil liability in the tort of negligence for motor vehicle accidents and undertakes a comparative analysis to evaluate the arguments in support of the introduction of such a scheme in Malaysia to address the growing concerns of injured victims. With social progress and change in societal values, individual and moral responsibility premised on the notion of fault was replaced with a contemporary system based on collective or community care and responsibility for the members of its society. Individual rights and freedom of choice was compromised for the greater good of the community. The paper concludes by looking at a scheme which guarantees comprehensive no-fault benefits to all injured persons while at the same time allowing qualified access to common law damages for those

non-negligent victims.

2. The Common Law Tort System: A Critique

It was fifty years ago that the Committee of Absolute Liability, New Zealand had in its Report concluded that there was a case for an accident insurance scheme that would cover all persons who are injured in any way notwithstanding negligence on their part. The Committee found that the traditional 'rules of negligence developed in the days of the horse and buggy' was never designed to address current situations faced with congested roads and high speed modern traffic. A decade later in 1974, the Royal Commission of Inquiry, Compensation for Personal Injury in its Report had outlined four principal criticisms against the system. They were: that the philosophy upon which the common law depends is illogical; the outcome of litigation is entirely uncertain and affected by mere chance; the procedure is lengthy and slow moving; and the absence of rehabilitation in its awards (Woodhouse Report, 1974). Some of its manifested weaknesses are discussed below.

2.1 The Fallacy of 'Fault'

Proving fault on the part of the defendant tortfeasor has been the cornerstone of liability under the modern tort action of negligence. This served to restrict the scope of the defendant's liability rather than expanded it (Robinson, 1987). Although it formed the foundation of the claimant's right to sue the wrongdoer for damages, the success of the action depended largely on the claimant's ability to establish negligence on the part of the defendant and that the alleged negligence had caused the injuries and loss complained of. The burden is carried throughout the entire length of the trial subjecting the claimant to satisfy both the legal and evidential burden of proof. To achieve this result, the claimant has to first clear the hurdles placed by the strict rules of evidence and procedural requirements of proof that the defendant has committed a fault before being entitled to recover any compensation. Should he fail to discharge this burden, then the defendant has nothing to answer. It is immaterial whether he has proved his defence or not. The plaintiff must prove his. Fault liability therefore shifts the focus of the court's attention away from the claimant's injuries to the nature of the defendant's conduct. It looks not to the needs of the accident victim but rather to the 'fault' of the defendant (Jones, 2002). If fault is not proved, then no matter how innocent the claimant and how serious his injuries the common law would leave him to bear the whole burden of his losses, notwithstanding its sizeable extent.

Road traffic accidents occur suddenly and unexpectedly. The judgement of drivers often involves split-second observations and decisions. This makes it difficult for the court in ascertaining who was at fault in the eyes of the law. Witnesses would have not been paying close attention at the time of the accident and their reliability is further undermined because the question of fault often has to be determined many years after the accident on the basis of the imperfect and uncertain recollection of events. They are not trained nor have the experience to gauge speed, time or distance, evidence which may be crucial in determining liability. Assessments of fault finally made on the basis of unreliable and incomplete information would produce distorted outcomes. The tort system has been known to place too much emphasis on the driver's blameworthy conduct without appreciating the fact that human error may not be the sole and independent cause of the accident. A combination of factors may have resulted in an accident. High traffic density, slippery road surface, road construction, roadside structures, weather conditions, poor lighting, mechanical defects, obstruction of vision and inadequate and improperly erected road signage have been identified as some of the causal factors. The Committee in the Woodhouse Report has stressed that accidents are not due so much to human error but to the present 'complicated and uneasy environment'.

Fault-based analysis that was introduced "in the days of the horse and buggy" was never designed to address the common cause of personal injury by accident and "personal attribution of fault has little relevance to contemporary life" (Puteri Nemie, 2004). Further concerns have been put forward by Atiyah who has listed six arguments against the notion of the fault principle. They are (i) that the compensation payable bears no relation to the degree of fault; (ii) that the compensation payable bears no relation to the means of the defendant; (iii) that the fault principle is not a moral principle because a defendant may be negligent without being morally culpable and vice versa; (iv) that the fault principle pays insufficient attention to the conduct or needs of the plaintiff; (v) that justice may require payment of compensation without fault; and (vi) that fault is an unsatisfactory criterion for liability because of the difficulties caused in adjudicating on it (Atiyah, 1980). Besides, not all injured victims of motor vehicle accidents may choose to institute an action for damages against the offending driver. For example, passengers in motor vehicles driven by a family member, friend, colleague or relative who are victims of negligence of the driver do not usually pursue their claim. They are among those persons who endure

pain and sufferings but receive no compensation (Ambiga, 2007). Included in this list are the so called “hit-and-run” accident victims who are unable to file an action for damages as the identity of the wrongdoer or his vehicle cannot be established. Such issue of identifying precisely the driver who was responsible is not required under a no-fault compensation scheme where compensation is based on injury and not on fault (Menyawi, 2002).

2.2 Administrative Inefficiency

There must be administrative efficiency in the proper utilization of resources when operating a selected compensation scheme. Its achievement must not be eroded to the extent that its benefits are delayed, or are inconsistently assessed, or the system itself is administered by methods that are economically wasteful (Todd, 2000). The present tort system has been found to be far too costly to operate and in many ways most unfair (Owen, 1985). The high costs involved in the administration of the compensation system, including legal fees and other charges, absorb a substantial portion of what is finally paid over to successful claimants. The Pearson Report estimated that the costs and expenses of operating the tort system amounted to about 85 percent of the value of tort compensation payments, or about 45 per cent of the combined total of compensation and operating costs (Pearson Report, 1978). This compares unfavourably to national social security system which has administrative expenses amounting to 11 percent of disbursements (Swanson, 1990). The Woodhouse Report found that “as a system it is cumbersome and inefficient; and it is extravagant in operation to the point of absorbing for administration and other charges as much as \$40 for every \$60 paid over to successful claimant”. Studies have found that given the circumstances of motor vehicle accidents, tort litigation is considerably more expensive than tort litigation in other forms. Slightly more than half of all liability insurance premiums are diverted to solicitors’ fees and administrative costs (Gary, 2000). More recent evidence in the UK suggests that legal costs, including both claimant and defendant costs, averaged about 30 percent of the total motor personal injury payments (Lewis, Moris and Oliphant, 2006). The position in Malaysia is no better than other common law jurisdictions and the issue of high cost of litigation has been the subject of considerable concern to various bodies especially consumer movements (Consumer Association of Penang, 2011).

2.3 Delayed Justice

The hallmark of a just and efficient legal system is its ability to offer prompt and timely delivery of justice to an injured claimant. A common and yet painful cry of the victims of motor vehicle accidents is the extensive delays involved before they finally obtain any compensation and until such time, they receive nothing from the defendant tortfeasor. Waiting for a period of four to five years or even more from the date of the accident is quite common in Malaysia and by the time compensation is received, it is often too little too late. Victims of serious bodily injuries are often in dire need of immediate financial assistance to pay for medical treatment, recuperation and rehabilitation in order to lead a normal life again and return to gainful employment. The protracted delays cause the injured litigant and his or her family to suffer unnecessary anxiety, financial hardship and mental distress while having to shoulder the whole financial burden of the loss (Todd, 2000). The difficulties are further compounded by the uncertainty whether or not they would finally actually receive any compensation for their injuries and losses.

A combination of factors has been identified in contributing to the delays as part of the legal process involved in tort litigation. They include: obtaining the relevant police reports, police sketch plan with key and police photographs of the scene of the accident depicting the position of the vehicles after the accident and the damage caused to the vehicles; difficulties in the location of witnesses and collection of evidence; getting medical reports; the need to arrange for examination and obtain reports by specialist medical practitioners; arranging suitable trial dates that are convenient for all parties involved; the congestion of court lists with increasing volumes of cases being filed; to patiently wait for the victim’s injuries to stabilise and obtain a further medical report that would genuinely reflect the seriousness of the injuries with any resulting permanent disabilities so that appropriate damages can be assessed; and the frequent postponement of cases.

2.4 The Uncertainties of Litigation Outcomes

Under the tort liability system, the innocent victim of a motor vehicle accident needs to pursue his claim in court against the alleged wrongdoer for compensation for his injuries and losses. His right to sue does not however

guarantee the result he seeks. He has the difficult task of proving the defendant's negligence and the resulting damage he had suffered and the causal link between the two, fulfilling both the legal and evidential burdens of proof. The outcome of the civil litigation has been described as being always a matter for conjecture (Franklin, 1967). The plaintiff must always make an election whether to pursue the wrongdoer at the risk of receiving nothing or to abandon his claim for damages altogether or settle the claim for a much lesser amount. There are uncertainties affecting the prospective plaintiff such as the uncertainty concerning the court's ruling on liability which would determine whether the claimed damages are payable or not; the impact of the court's ruling in regard to the payment of costs of the action and since, "costs follow the event" the parties are faced with the risks not only on the outcome of the court's ruling, but also on the costs incurred; and the uncertainty whether an offer of settlement will be made by the defendant's insurers, so that an early settlement can be agreed thus avoiding a trial and the payment of costs. A combination of all these factors creates an environment of risks and uncertainty for the injured plaintiff leaving them 'under pressure to settle their claims for amounts less than they would receive if their claims went successfully to trial' (Rogers, 2010).

2.5 The Lump Sum Award

The only form of compensation known to the common law is a lump sum award. The defendant pays the damages to the plaintiff all at once, usually some time shortly after the settlement or judgement, whether the amount is paid in a lump sum or periodically did not matter because it is the amount paid that impact the goals of tort law (Henry, 2002). The plaintiff, on the other hand, must commence his action reasonably promptly "once and for all" for his entire loss, both past and future. He can neither split his cause of action by suing separately for different heads of damages nor can he bring a subsequent action to increase the award in case the loss turns out to be less than expected at the time of the trial. Compensation has been accepted as a major aim of an award of damages for personal injury. Its object is to place the claimant in the position he had been in financially, had he or she not been injured. This has been a practice in common law countries to award damages for personal injury and loss of dependency in one lump sum in a single action. But there are those losses that have no obvious money equivalent or which cannot be valued with the same degree of accuracy such as pain and suffering and loss of amenities of life.

Lump sums are arrived at by adding together the approximate money values for each category of loss suffered by the injured claimant. They include compensation for both losses already suffered and those which are expected in the future. Pre-trial losses, including loss of earnings can quite readily be expressed in monetary terms and agreed. However, in cases of serious injury, damages for pain and suffering and loss of amenities, and future losses, such as the loss of future earnings and the cost of continuing medical and nursing care, are likely to be the largest component in the lump sum award. In such cases, losses are difficult to assess accurately. There is always an element of uncertainty about what would have happened had the accident not taken place and what will happen in the future (Lunny and Oliphant, 2010). The lump-sum principle, combined with the rule that damages can be recovered once only, causes serious difficulties in actions for personal injuries, particularly where the medical prognosis is uncertain. The victim's condition may worsen or, it may unexpectedly improve. The court's assessment of damages based on assumptions may hence prove to be incorrect (Jones, 2002).

Thus, the practice of paying damages in one lump sum has been heavily criticized and a major disapproval of such an award is the difficulty, if not impossibility, of accurately estimating future economic loss (Palmer, 1993). Inaccuracies that occur can never be adjusted in favour of the plaintiff because the assessments are made with absolute finality (Woodhouse Report, 1974). Damages awarded for the future are based on an injury the effects of which will continue to impact on the life of the road accident victim. Medical practitioners who provide reports on the medical condition of the victim may have examined the victim only once or twice and then based on the prognosis predict the duration of impairment or disablement and the degree to which such disablement may be reduced by surgery or by the provision of aids or devices. They may make predictions on the victim's ability to recover and return to employment or his ability to remain employed in a particular job. Where the life expectancy of the victim of a serious injury cannot be predicted with any certainty, a lump sum award made on the basis of such predictions may either be an overestimation or an underestimation if they are inaccurate.

The system provides no opportunity for constantly monitoring and reviewing the victim's condition against the lump sum award. This can prove unsatisfactory as it offers the plaintiff no recourse if his condition worsens after the trial or if something unforeseen at the time of trial occurs which drastically alters his position. Any improvement or deterioration in the condition of the victim is completely irrelevant where lump sum awards are made as a 'once-and-for-all' payment. There is no room for adjustments if it appears that the forecasts are

inaccurate (Margaret, 2009). The uncertainties resulting from such predictions may result with the victim either having not received enough or receiving too much for his or her anticipated future loss of earnings. Sometimes the claimants survive far beyond their anticipated lifespan and find that the damages awarded have been depleted and they are forced to spend their remaining years depending on family members for charity or on the state for any welfare or disability payments. Should the claimant die sooner than was anticipated in the court judgement, the balance of the damages awarded might become a windfall to his or her beneficiaries as it may happen in the case of a child who dies just a few weeks after the compensation award for pain and suffering, loss of amenities, nursing care until she reaches the age of, say for example, 55 years, was paid to her mother.

Furthermore, there is no requirement that the lump sum damages awarded to the victim to provide for his future medical, rehabilitation or nursing care expenses would be utilized for such support. The court is unconcerned with what the successful plaintiff will eventually do with his awarded sum. It does not look beyond the judgement to ensure that the sum is actually spent for the purposes it is awarded. Extravagant spending by the claimant will tend to exhaust the damages quickly. Monies meant for nursing care and for the loss of future earnings may be expended to provide for the needs of immediate and close family members of the victim, housing requirements, educational needs etc. and in years to come, the claimants may find themselves without the necessary financial resources to provide for medical, rehabilitative or nursing care or basic daily needs for future years because the funds expended for purposes other than for which they were intended are now depleted. This frustrates the very purpose for which damages were awarded to the injured claimant and experiences reveal that lump sum judicial awards made in favour of victims of serious injuries are fraught with concerns and are under attack (Steven, 1985).

2.6 Deterrence a Misguided Element

Tort law was promoted as a system where wrongdoers pay for the injuries they cause, thus encouraging socially desirable conduct. The prospect of having to pay compensation for losses suffered in cases of personal injuries and death will act as an incentive for negligent road users to exercise care to avoid causing accidents. To restore the victim to his original position and repair the damage caused, the defendant wrongdoer must be required to make good the loss that he had caused the victim by his wrongful conduct and by threatening the people with having to pay for the harms that they have caused, tort law forces them to take the interests of others into account and thus succeed in preventing injuries by deterring dangerous and harmful conduct (Calbresi, 1965).

It is in these circumstances that tort liability provides an important financial incentive in preventing those injuries which can be avoided by tortfeasors taking reasonable precautionary action. By and large, a motorist who drives at a dangerously high speed not only dangers third parties but simultaneously endangers himself and is therefore contributorily negligent for the injuries he suffers as a result of his own negligent conduct. His recovery of damages is proportionately reduced. Besides, it also has its objective of fairness or corrective justice in requiring the defendant to bear the burden of assuring that the plaintiff receives compensation for the injuries caused as a result of his negligent conduct, thus righting the wrongs and doing justice between the parties (Schwartz, 2000). Additionally, tort law has been viewed as a mechanism for punishing wrongdoers (Cook, 1996). It is seen as a retributive mechanism (Martin, 1990). On the other hand, there is the opposing argument that the deterrent element will be non-existent if the negligent and potentially harmful conduct in question had not caused injury or loss to anyone thus resulting in no legal liability. There has to be a victim who claims to have suffered harm as a consequence of that wrongful conduct for tortious liability to arise before the deterrent argument can come into play.

Driving can be potentially dangerous no matter how careful a motorist is as it only takes a split second for a disaster to strike and accidents are typically the result of a momentary lapse in attention. Sometimes a period of momentary inattention can produce tragic results, while in others a case of extremely bad driving can fortunately result in the driver escaping any accident. Imposing liability would not produce the desired effect on inadvertent negligent conduct that result from momentary lapses of attention since people who act inadvertently are not acting in ways that presuppose the use of their conscious, rational minds. Motorists cannot be compelled by sanctions or induced by pecuniary incentives to have continuous attention in the course of driving. They are exposed to a plethora of risks while driving and many competing demands for their attention and can therefore devote close attention to some risks only at the expense of inattention to the other risks, the lapse of which may have resulted in an accident (Howard, 1985). There are two further reasons that have been advanced to explain the ineffectiveness of the deterrent function under tort liability. First, the penal sanctions contained both in the Road Transport Act 1987 and in the Penal Code. Motorists' behavior is covered in a comprehensive manner by

the nation's road traffic laws. Almost every instance of a motorist's negligence violates some legal provision and hence exposes the negligent motorist to public law penalties and in no other sector of tort law is there such an extensive system of public regulation paralleling the tort system (Schwartz, 2000). Second, the statutory requirement for all motor vehicles on the road to be covered with compulsory third party insurance policy in respect of third party risks.

It is more likely that the threat of these punitive sanctions for such negligent or reckless conduct and for driving under the influence of intoxicating liquor and drugs present in the Road Transport Act and Penal Code would instill fear and compel the potential defendant wrongdoer to exercise reasonable care, obey the road traffic rules and avoid potentially dangerous conduct. In their absence, tort liability operating independently is unlikely to deter such misconduct on the road. To the motorists, considerations of personal safety, fear of licence suspension and the threat of criminal sanctions is enough to deter dangerous conduct (Robinson, 1987). The deterrence function will eventually have to be shifted from judgements for compensatory damages awarded by the courts to penalties imposed by regulatory agencies (Brown, 1985) and in avoiding accidents the incentives provided by regulatory instruments such as criminal law sanctions combined with regular supervision are more effective in the domain of individual torts (Hubbard, 2006). The question whether replacing tort liability by a no-fault scheme would remove the deterrent function on accident-producing activities was considered by the Law Commission which came to the conclusion that the alleged deterrent role of tort was not significant citing a study of traffic accidents in New Zealand which showed that its removal had no adverse effect on driving habits (Brown, 1986). It has also been argued that there is no clear evidence to show an unequivocal link between the impact of imposing tort liability for causing injury with lower accident rates (Todd, 2011).

2.7 Compulsory Third Party Insurance

The deterrent element has been further weakened by the introduction of compulsory third party liability insurance. In Malaysia, the legislature had intervened in the tort mechanism through the enactment of Section 90(1) of the Road Transport Act 1987 requiring motor vehicle users to have in force a policy of insurance in respect of liability connected with the death or bodily injuries to third parties arising out of the use of the motor vehicle on a road. An injured person has now been given a statutory right to bring a recovery action against the insurer of the negligent motorist for damages although not being a party to the contract of insurance entered into between the insurer and the insured. A judgement which has been awarded in his favour may thus be enforced directly against the insurer. The compensation is therefore not paid by the defendant tortfeasor and "the claim that the prospect of damages has a financial implication loses all its force against a background of compulsory insurance by means of which these losses are so widely shared". Complete liability insurance protection that shifts the direct economic deterrent pressure of tort law from would be tortfeasors to insurance companies, 'undoubtedly blunts the deterrent edge' (Rogers, 2010). This shift complicates tort law's potential for behavioural control (Stephen, 1985). The wrongdoer is left unpunished in a system of tort liability where punishment has been a significant justification of the system (Menyawi, 2002).

On the other hand, writers such as Calabresi are of the view that this role of punishment should be left to the sphere of criminal law and not be extended into civil accident claims. He believes that to deter acts that are sufficiently bad regardless of their market usefulness is not through a "fault" system connected with insurance devices but through criminal or semi-criminal penalties (Calabresi, 1985). It has been said that there simply does not exist any clear and unambiguous evidence that the tort system has significant deterrent effect, whether directly or within its modern law and economics garb (Palmer, 1995). Accident-producing behavior carries a substantial risk of injury to the driver himself and dangerous conduct commonly constitutes a criminal offense and if a motorist is not discouraged by the threat of injury to himself and the threat of penal sanctions, he is unlikely to be deterred by the possibility of tort liability, particularly if an insurer will absorb the worst consequences (Brown, 1985). Another unfair aspect of the third party liability insurance is its exclusiveness, restricting coverage only to a limited class of injured persons and under specified circumstances. The scheme excludes coverage to the insured driver and his permitted driver, motor cyclists and their pillion riders, family members, friends and passengers travelling in his vehicle, and those self-employed persons travelling under a contract for employment.

3. The New Zealand and Victorian Experiences

It was through the Accident Compensation Act 1972, which came into force on April 1 1974, that the New

Zealand Parliament decided to replace the common law action for damages for personal injury based upon proof of another's fault with an accident compensation scheme where the right to recover compensation was based on the claimant being covered by the scheme. A person, who suffers personal injury by accident or dies as a result of personal injury so suffered, is barred from bringing any action for damages arising out of the injury or death in any court in New Zealand independently of the Act. It was a pure 'no-fault' compensation system. The Scheme is administered by a corporate body known as the Accident Compensation Corporation which is largely independent of government control. Among its primary duties, the Corporation determines cover for persons for whom claims are lodged; provide entitlements in accordance with the provisions of the Act; manage the assets, liabilities and risks in relation to the Accounts required to be maintained and operated; collect levies; and administer dispute resolution, reviews and appeals. The Motor Vehicle Account derives its funds from premiums paid by motor vehicle owners and holders of trade plate licences in conjunction with the registration and annual licensing of that vehicle or the issue of licences. A petrol levy at the rate of 9.9 cents per every litre is paid annually by the Government to the Corporation. There will also be appropriations made by Parliament to the Account.

The 2011-2012 levy rates to be applied by the Corporation for motorists for the annual vehicle licensing fee and petrol levy was \$334.52 per motor vehicle. The Account recorded an increase in levy revenue of 16.4% rising from \$846 million in 2010 to \$985 million in 2011. It has net assets of \$4.5 billion and outstanding claims liability of \$7 billion. However, a pragmatic view of the Motor Vehicle Account actually demonstrates a net surplus of \$1.14 billion for the year 2010/2011 compared to \$530,409 for the preceding year (Annual Report, 2011). The total net levy revenue collected by the Corporation was about \$4.8 billion compared with \$4.5 billion that was recorded for the previous year. The surplus from underwriting activities and investment income were \$1.8 billion and \$1.7 billion respectively compared with \$1.1 billion and \$1.4 billion received from the same sources respectively for the previous year. The total costs of claims incurred were \$2.9 billion compared to \$3.8 billion for previous year. The Corporation enjoyed an overall net surplus of \$3.5 billion compared with \$2.5 billion for the previous year. Its funding targets were exceeded for all accounts during 2010 – 2011 and as a result of its strong performance the Accident Compensation Corporation had expressed confidence that it would reach its full funding requirements as targeted by the year 2019.

The surpluses generated by the scheme, minimal administration costs involved, the provision of automatic and extensive coverage of benefits at affordable charges, prompt and expeditious delivery of certain and well informed benefits and entitlements have all contributed to the success of the Scheme. The Scheme has been recognized as an exemplary model for a universal no-fault liability scheme for victims of all accidents and has been judged to be a substantial success (Todd, 2002). It is the most extensive no-fault compensation scheme to have been implemented in the common law jurisdiction and the most radical departure from private law and has been also described in a brochure published in 2004 to mark 30 years of the Accident Compensation Corporation as "the most rational and the most humane compensation law in the world" (ACC Report, 2004). Victims of accidental injury need not prove fault or causation. As long as injury is satisfactorily established, the claimant will receive compensation from the scheme for his losses. There is no danger of the scheme leaving a victim entirely uncompensated and there is no danger of a single defendant being forced to bear the full costs of the injuries (Miller, 2006). Throughout the 1980s and till today, there has been no call to return to the former common law system of compensating accident victims (Rennie, 2003). Todd in his evaluation of the performance of the statutory scheme in New Zealand, commented, "... Others, including me, view the scheme as a substantial success. The cost compares very well with any system where liability needs to be proved, the coverage is far greater and the benefits are affordable. Any public administration is not necessarily inefficient" (Todd, 2002). Todd judged the scheme to be a success in comparison to the tort system and according to him it was unthinkable that after 25 years of experience New Zealand will return to a tort system (Todd, 2011).

The Australian state of Victoria introduced a modified "no-fault" scheme through the Transport Accident Act 1986 the purpose of which was to establish a scheme of compensation in respect of persons who are injured or die as a result of a transport accident. It is a comprehensive no-fault liability accident compensation scheme in which anyone who is injured or dies as a result of a transport accident within Victoria or interstate if in a Victorian-registered vehicle is eligible to receive compensation, irrespective of who caused the accident. A key feature of its scheme is the combination of no-fault and common law benefits where everyone was covered regardless of fault, as well as allowing those who could prove fault to pursue further a common law claim for damages through the courts for pain and suffering, loss of enjoyment of life and past and future loss of earnings. But their right to sue and recover damages from a negligent driver has been significantly restricted by allowing a claimant to sue for pain and suffering and economic loss only if he or she has suffered "serious injury".

Besides, the claimant must prove negligence against the other party and commence proceedings within six years from the date of injury. Ceilings are set on the maximum amount recoverable under common law. Damages payable for pain and suffering is limited to a maximum sum of \$487,100 and the maximum sum payable for pecuniary loss (past and future loss of earnings) is \$1,096,020. The threshold for common law access is \$48,690 (Transport Accident Act 1986). The figures are indexed in accordance with the Consumer Price Index of Melbourne at the beginning of each financial year. In addition, the Commission will apply a 6% discount to the lump sum award for damages made for future economic loss to allow for inflation, income from the investment of the sum awarded and the effect of taxation on that income. The Transport Accident Commission established under the Act is also the monopoly compulsory third party insurer of all Victorian registered motor vehicles and as such, the Commission pays damages to accident victims who have sustained serious injury and thus had access to common law remedies. An analysis of the financial performance of the Commission discloses an after-tax operating loss of \$1,024 million in 2011/12 compared with an after-tax operating profit of \$279 million for the previous period. This was the result of significant volatility and uncertainty in the global financial markets which contributed to the massive drop in investment income from \$748,717 in 2011 to \$332,401 in 2012, the major factor attributable to the loss (TAC Annual Report, 2012). However, the Commission's performance from insurance operations had increased to \$351 million compared to \$187 million for 2011. This strong result reflects the Commission's emphasis on efficiencies, accident prevention and strong claims management.

Moving in the direction of a scheme that is based on community care, support and responsibility, rather than one that is founded on fault, the Australian Government has very recently introduced a new National Injury Insurance Scheme that would provide lifetime care and support services to all people affected by catastrophic injury arising from motor vehicle accidents. States and territories are required to set up no-fault catastrophic injury schemes by the end of 2013. The scheme would provide reasonable and necessary attendant care services; medical and hospital treatment and rehabilitation services; home and vehicle modifications; aids and appliances; educational support; help for people to have a greater role in the workforce and socially; and domestic assistance. The additional funds required for the scheme would come from existing insurance premium income sources and from local rates (Productivity Commission Report, 2011).

4. The Case for a No-fault Compensation Scheme in Malaysia

A functional structure made up of holons is called holarchy. The holons, in coordination with the local The need for an alternative scheme for motor vehicle accidents in Malaysia has been proposed for a few years since 1980's (Harun Hashim, 1995). The proposal is not only founded on the argument that the existing law is inadequate to provide compensations to accident victims but it is also supported by strong practical considerations and cogent policy reasons (Lee, 2005). A no-fault approach is recommended to address the injustices perpetuated by the existing system and to make certain that claimants receive prompt and expeditious relief with minimum formalities regardless of who caused the injuries without the need of having to go to court. The scheme will remove the financial hardship and emotional distress of families of accident victims during the period of incapacity with the provision of guaranteed benefits that would preserve their quality of life and human dignity and make them useful citizens of the nation. Furthermore, experiences can be drawn from the SOCSO scheme established under the Employees' Social Security Act 1969. The no-fault scheme for industrial injuries and occupational diseases has been in operation for 41 years. SOCSO's surplus of income over expenditure for the year 2009 was a massive RM 1.3 billion compared to RM 841 million for the previous year. The administrative costs accounted for only 6.5% of its total income reflecting its prudent and efficient management. The funds stood at RM 17.7 billion (SOCSO Annual Report, 2009). Its impressive financial and operating success is clearly evident of the practical viability of its no-fault scheme. If society in the last century, and in Malaysia 43 years ago, had demonstrated its willingness to accept responsibility for injured workers and surrender its right to prosecute the alleged negligent employer, it can be said that it is very likely that a society in today's contemporary era holding firm beliefs of an injured individual's right to receive immediate care and treatment to alleviate financial hardship and suffering coinciding with community's responsibility to provide such support and care, would readily accept an extension of the no-fault coverage to include motor vehicle accident victims.

In considering the design of a compensation model, the hybrid or modified no-fault compensation scheme would be the preferred choice for the proposed scheme where both no-fault and common law benefits co-exist. Under such a scheme, the individual's right to sue and recover common law damages is partially retained while at the same time it promises the delivery of minimum benefits to every person injured in a motor vehicle accident regardless of fault. It offers innocent victims the opportunity to have access to limited common law benefits thus

preserving the right of those who could prove fault to pursue further a tort claim in Court for damages for pain and suffering and loss of enjoyment of life subject, though to a statutory maximum. A qualitative verbal threshold will be set, designed to restrict access to tort action to the more serious injuries and unless the claimant meets the defined criteria for a "serious" injury, he or she is precluded from bringing an against the defendant driver, thus successfully eliminating all cases that involve minor injuries which are dealt with by the scheme on a no-fault basis.

As a general rule, the major differences that exist in hybrid no-fault systems largely depend on the weight accorded to an innocent or non-negligent injured person's right to sue for pain and suffering against the limitations placed on those rights by the no-fault scheme. The scheme endeavor to balance the rights of the innocent injured person with the need for no-fault benefits. While a system that offers only common law coverage can produce unjust results, a hybrid system which guarantees no-fault entitlements is able to combine the best of both approaches in one system. Founded on the premise of community responsibility and care, the scheme focuses on the injury by providing consistent coverage and guaranteed minimum benefits to all injured parties regardless of fault. They provide much more predictable and coordinated care and support over an injured person's lifetime while encouraging people to improve their functioning following an injury (Productivity Commission Report, 2011). States in Australia have recently been urged by the Finance Minister to agree on minimum standards for no-fault motor vehicle insurance to ensure that victims of motor vehicle accidents had the same level of insurance in the country's first step towards a national no-fault injury insurance scheme (Lunn, 2012).

This is an affirmation of the general acceptance of the Australian people of the success of the no-fault liability schemes operating in Victoria and Tasmania (Wright, 2012). A prominent feature of modern compensation models is the provision of rehabilitation and long term care and assistance to accident victims thus resulting in a significant transfer of resources towards the prevention of accidents and minimization of its consequences through rehabilitation. A care-based scheme would be fundamentally different from a compensation model which is concerned with making good a loss as far as possible with money aimed at restitution. It is backward looking. Whereas, a care-based model, on the other hand, is concerned only with the present and the future of the accident victim by the provision of services and long-term attendant care aimed at maximizing recovery and alleviate suffering (Robinson, 1987).

5. Confronting Challenges

Although the proposed new scheme for the nation would continue with compulsory insurance, it would incorporate additional features to extend its coverage of guaranteed minimum benefits to all persons injured in motor vehicle accidents. Its inclusiveness rather than its exclusiveness would be an essential aspect of the philosophy of the new scheme. Its introduction would certainly draw challenges from groups who would find that their financial interest has been harmed. One such group that can be expected to vigorously oppose its introduction would be the private insurance companies who find that their role of issuing compulsory third party risks insurance would be undertaken by a statutory Corporation created to administer the scheme. The Corporation will be entrusted with the sole issuing authority for all no-fault compulsory motor insurance policies, not limited to third party cover and neither would it be subject to the negligence of a driver as a pre-condition to statutory entitlements.

Insurance companies have been noted to have suffered losses from third party insurance claims. In 2008, insurers have been reported to have collected RM 490 million in premiums for third party bodily injury and death coverage but paid out RM 1.3 billion in claims, resulting in a loss of RM 810 million (Ming Hin, 2010). The removal of this part of its general insurance business would be justified in avoiding such stressful losses and release resources to be absorbed by the more profitable sections of its business. This will further allow insurance companies the space to explore the possibility of creating new product lines for its business to utilize the resources tied up in the unprofitable sectors of its business. The thought that the proposed new Act would provoke serious opposition from them would appear to be a misconception. It has been further argued that they do not make a loss because it is for the social good but rather due to mismanagement and insufficient provision of reserves to meet claims (Luntz, 2004). The insurance companies would still be at liberty to continue to issue comprehensive motor insurance policies covering theft of vehicles, property damage to the insured's vehicle and third party vehicles. Additionally, it can also experience a surge in top up coverage for personal injuries and death as what is guaranteed to be provided under the proposed Scheme is minimal benefits. The Scheme does not make good all losses suffered nor does it aim to restore the claimant to the position he had been in before the tort

was committed.

The other interest group that is likely to pose a challenge would be lawyers handling third party motor vehicle accident claims who would undoubtedly face a reduction in their workload. Here again, the new scheme would retain the common law action for damages for pain and suffering and loss of amenities. Hence, the services of lawyers will be required to file, prosecute and negotiate settlement of claims on behalf of injured claimants. Notwithstanding this, they will face a significant reduction in their incomes. But that is the very object of the scheme which has been designed to see a shift in the redistribution of incomes from insurance companies and lawyers in favour of the injured victims in the form of wider coverage and fairly generous benefits at affordable costs. The same money that would otherwise be fed into the tort system with all its weaknesses will be diverted away from insurance companies and lawyers and made available to accident victims expeditiously with a minimum of formalities.

The major stakeholder of a compensation scheme is the consumers. As beneficiaries of the scheme, their views cannot be disregarded and must take priority when designing a scheme for their benefit. They have clearly expressed their dissatisfaction with the present scheme. The Consumer Association of Penang, a strong advocate of consumer rights had urged the Government to ignore calls made by interest groups to retain the existing system motivated to protect their private interest while being unconcerned to the injustices done to accident victims. In wasting precious time, effort and money in determining who is at fault, the Association stressed that the system should concentrate on assisting the injured with expeditious relief and rehabilitation while reiterating its firm position that the present scheme should be scrapped and be replaced by a no-fault liability system (Consumer Association of Penang, 2011). Being a scheme constructed to promote social justice and overall wellbeing of its injured citizens, individual and private interest must be compromised for the public benefit and greater consumer good of the nation.

6. Conclusion

Historically, the values of society based on individual culpability and responsibility was reflected in the traditional moral based fault regime. . With the evolution of societies, these values have changed and they have been replaced by beliefs that represent the contemporary twenty first century society, specifically the principles of community care and collective responsibility which has become a prominent feature of modern compensation schemes where the focus has been on the injured victim and resources directed at the injury rather than on one's culpability. The time is fitting for the proposed introduction of a statutory scheme aimed at promoting social justice and community responsibility, care and support for victims of motor vehicle accidents. Constructed on the concept of no fault liability, the focus of compensation model will be directed at the injury suffered by the claimant and in providing a redress mechanism that will address the claimant's concerns in an expeditious, inexpensive and problem-free manner without having to investigate into the blameworthiness of his conduct.

In the final analysis, the political will and resolve of the Government is crucial for the introduction of the new law and to see to its successful implementation. To promote social justice, community responsibility and public benefit as its priority, the government must take the bold and unprecedented decision to initiate a Bill in Parliament that would bring about a major shift to the legal landscape when it introduces a fresh compensation model for victims of motor vehicle accident There are numerous challenges that the Government would confront throughout the implementation and operation of the Scheme, but a firm and unwavering commitment to the ideals of the Scheme is fundamental in realizing its goal. It is also vital for the rest of society to play a positive role in supporting the transformation when the nation moves away from the traditional moral based fault regime towards a social justice no fault scheme.

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